Supreme Court, U.S.
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No. 00-594

In the

Supreme Court of the United States

Joseph J. Waymire,

Petitioner,

versus

Norfolk and Western Railway Company.,

Respondent..

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE UNITED TRANSPORTATION UNION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BEFORE THE COURT'S CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI

NOW COMES Amicus Curiae, The United Transportation Union, in support of petitioner, Joseph J. Waymire, by its attorney, Clinton J. Miller, III, pursuant to United States Supreme Court Rule 37, and moves this Honorable Court for leave to file an Amicus Curiae Brief in support of the petitioner's Petition for Writ of Certiorari and, in support thereof, states:

1. Respondent, Norfolk and Western Railway Company, through its attorney, Mr. Geoffrey L. Blazi, has not provided its consent to the submission of this Amicus Curiae Brief in support of the petitioner's position. However, petitioner has provided his consent.

2. Amicus Curiae, the United Transportation Union, is a labor union representing among others, railroad transportation operating employees on every major railroad in the United States. The railroad operating employees represented by the United Transportation Union rely on the protection of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, to compensate them for on-the-job injuries.

3. Petitioner brought a cause of action against respondent pursuant to the FELA due to injuries he sustained in a train/motor vehicle collision on June 28, 1996. Respondent filed a Motion for Summary Judgment, which was granted by the district court. On July 14, 2000, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the district court's decision in all respects. The Court of Appeals held that a railroad defendant in a FELA case could not be liable for excessive speed and inadequate crossing protection claims where both the train speed and railroad crossing protection complied with regulations prescribed by the Secretary of Transportation

pursuant to the Federal Railway Safety Act of 1970 ("FRSA"), 49 U.S.C. §§ 20101 - 21311. The Court of Appeals held that for purposes of train speed and railroad crossing protection, petitioner's FELA claims were superseded by the FRSA of 1970.

4. Amicus Curiae United Transportation Union is especially concerned that should the Court of Appeals decision be upheld, it would severely diminish FELA plaintiffs' ability to recover against their employer for on-the-job injuries. Contrary to the decision below, this Court has never ruled that a railroad employee's FELA claims are superseded by the FRSA.

WHEREFORE, Amicus Curiae, The United Transportation Union, respectfully prays that this Honorable Court grant it leave to file an Amicus Curiae Brief in support of petitioner's Petition for Writ of Certiorari.

Respectfully submitted,
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QUESTION PRESENTED

Whether a regulation prescribed by the Secretary of Transportation pursuant to the Federal Railway Safety Act of 1970 ("FRSA"), 49 U.S.C. §§ 20101 - 21311, supersedes a claim brought pursuant to the Federal Employers' Liability Act ("FELA").

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The United Transportation Union is a labor union representing, among others, railroad transportation operating employees on every major railroad in the United States. On a daily basis, railroad workers put their own safety at risk and rely on the protection of the Federal Employers' Liability Act ("FELA") 45 U.S.C. §§ 51-60. This Act is vital to the ability of these workers to safely and efficiently perform their duties. The United Transportation Union fully supports the arguments presented on behalf of the petitioner, Joseph J. Waymire, and urges this Court to review the decision of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse the order below and remand the matter to the district court for trial. Although the decision of the Court below is important to Mr. Waymire, it has even greater significance for the thousands of railroad workers in the United States who are the life blood of our railway system.

In this case, the Court of Appeals has misapplied the previous decisions of this Court which have held that FELA plaintiffs are treated differently than common law plaintiffs. It was Congress' intent to provide broader protection for FELA employee plaintiffs than typical common law plaintiffs because the FELA is a work-related compensation statute. The decision below has severely undermined FELA plaintiffs' ability to recover against their employers for on-the-job injuries. In ruling that by complying with the Code of Federal Regulations ("CFR") the railroad has fulfilled its obligation under the FELA to provide a reasonably safe place to work, the Court of Appeals has ignored the scope and intent of the FELA. The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 et seq., does not impede or limit a railroad employee's right to recover for on-the-job injuries pursuant to the FELA. Contrary to the decision below, this Court has never ruled that an employee's FELA

claims are superseded by the FRSA.

If the decision below is upheld, thousands of railroad employees who travel over railroad crossings and are exposed to the risk of harm of train/motor vehicle collisions will now be severely undermined in making improper speed and inadequate crossing protection claims pursuant to the FELA. This negative impact on the rights of FELA plaintiffs is of vital interest to the United Transportation Union. Amicus curiae believes that its perspective will complement that of petitioner and will provide assistance to this Court in deciding the issues.[1]

INTRODUCTION AND SUMMARY

Petitioner, Joseph J. Waymire, initiated this suit in the United States District Court for the Southern District of Indiana against respondent pursuant to the FELA due to the injuries he sustained on June 28, 1996 in a train/motor vehicle collision in Muncie, Indiana. The alleged occurrence took place at the McGalliard grade crossing, which was protected with flashing lights and bells.

The evidence obtained during discovery revealed that the train on which Petitioner was riding collided with a truck which was trapped on the tracks because of traffic conditions. Discovery further revealed that petitioner and other railroad employees had, prior to the alleged occurrence, observed other motor vehicles trapped on the McGalliard crossing because of traffic conditions as trains approached. Moreover, accident reports from both the Muncie Police Department and respondent's police revealed four motor vehicle/train accidents and seven "near miss" incidents at this crossing in the seven years prior to the alleged occurrence.

The Federal Railroad Administration ("FRA") had

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[1] Respondent has not provided its consent to submission of this brief. Petitioner has provided his consent.

designated the track at McGalliard crossing as Class 4 track because it is mainline track. Railroad management employees, as well as petitioner's expert, explained that this FRA designation primarily refers to the type of maintenance a railroad should provide at a certain location. The class 4 designation allows trains to operate at speeds of up to 60 mph. Despite this authority to run trains at high speeds, up until 1992, respondent had maintained a speed limit of 10 mph. In 1992, respondent raised the speed limit to 25 mph to save on the economic costs of operating and maintaining a train.

The engineer operating the train and petitioner testified that had the prior speed limit of 10 mph been in effect on the day of the alleged occurrence, the train involved would have been able to stop prior to impact. This testimony was confirmed by respondent's Road Foreman of Engines. In addition, petitioner produced expert testimony which established that respondent's decision to increase train speed from 10 mph to 25 mph at the McGalliard crossing was a cause of the accident. Expert opinion also established that respondent should never have increased the speed limit at the McGalliard crossing without the installation of crossing gate protection at the crossing.

Respondent moved for summary judgment, which was granted by the district court despite the substantial evidence of negligence established by petitioner. On July 14, 2000, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the district court's decision in all respects. Relying on *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed 2d 374 (2000), the Court of Appeals ruled that if an FELA defendant complied with the FRSA, it could not be held liable for excessive speed and inadequate crossing protection claims. For purposes of train speed and railroad crossing protection, the Court of Appeals held that petitioner's FELA claims were superseded by the FRSA.

ARGUMENT

I.

The FRSA Of 1970 Was Enacted To Supplement, Not Supersede, Existing Federal Laws Such As The FELA And This Issue Is A Question Of First Impression Before The Court.

In 1970, Congress passed the FRSA, 49 U.S.C § 20101 et seq., for purposes of promoting rail safety and reducing rail accidents. Congress by virtue of 49 U.S.C. § 20103, General Authority, gave the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103(A) (emphasis added). Congress enacted the FELA in 1908 with a focus on reducing injuries and death resulting from accidents on interstate railroads. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Nothing in the language of the FRSA, either stated or implied, suggests that it was Congress' intent with the passage of the FRSA to impede or limit a railroad employee's right to recover for on-the-job injuries pursuant to the FELA. This Court has held that the FELA is a broad remedial statute which Congress enacted with the intent to provide liberal recovery for injured workers. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). The FRSA does not provide the Secretary of Transportation the authority to supersede or undermine the FELA and the federal common law of rights and obligations under this Act of Congress.

In *United States v. Texas*, 507 U.S. 529 (1993), this Court stated: "Courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. at 534 (citations omitted). The language of the FRSA in no way

suggests that Congress intended to undermine a plaintiff's claim under the FELA as developed by federal common law. Because there is no "statutory purpose to the contrary," the FRSA should not be used as a means to displace petitioner's previously available FELA claim.

This is a case of first impression in this Court. The interaction of the FELA and the FRSA is of vital import to thousands of railroad employees who are at risk while operating trains which travel over railroad grade crossings. The decision below reads into the FRSA the authority to supersede a FELA plaintiff's excessive speed and crossing protection claims when no such authority is stated or implied in the FRSA. This Court should address this question of exceptional importance relating to a uniform federal compensation statute.

II.

In Ruling That Petitioner's Speed And Crossing Protection FELA Claims Are Superseded By The FRSA, The Decision Below Severely Undermines The Scope And Intent Of The FELA

As the labor representative of thousands of railroad operating employees who operate trains which travel over railroad crossings nationwide, United Transportation Union known one of the dangers of a railroad employee's job is the not insubstantial risk of being involved in a train/motor vehicle collision. As a result of the decision below, a railroad employee's means of recovery has been severely diminished if that employee has the misfortune of being injured in a motor vehicle/train collision. Because the FELA is a railroad employee's remedy for on-the-job injuries, it is his or her primary means of injury compensation. All too often the driver of the vehicle involved in a crossing accident will have inadequate insurance to fairly compensate a railroad

employee for on-the-job injuries. As a result of the decision below, the membership of the United Transportation Union face the real prospect of being left without a means of recovery pursuant to the FELA if they are injured in a motor vehicle/train collision.

The decision below is contrary to the intent and scope of the FELA. In affirming the district court's summary judgment ruling, the Seventh Circuit, relying on *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk Southern Railway Co. v. Shanklin*, 120 S.Ct. 1467, 146 L.Ed 2d 374 (2000), reasoned that since this Court has ruled in a state common law action that compliance with promulgated regulations under the FRSA precludes excessive speed and crossing protection claims, for the sake of national uniformity, under the FRSA, the same standard should be applied to both state law and FELA cases. The Seventh Circuit reasoned that the FRSA state law preemption provisions of 49 U.S.C § 20106 and their stated goal of national uniformity applied to a claim brought pursuant to FELA. This is the first decision issued by a Court of Appeals where the FRSA was found to preclude and effectively preempt a plaintiff's FELA claim.

What is particularly troubling to is that in this case respondent clearly recognized that the FRA authorized speed was completely inappropriate with respect to the safe operation of trains at the McGalliard crossing. Up until four years prior to the accident, because of heavy traffic conditions, respondent had operated trains at 10 mph at this location, 50 mph below the FRA authorized speed. In 1992, respondent raised the speed limit to 25 mph, still 35 mph below the FRA authorized speed. However, despite operating trains at speeds substantially below the speed authorized by the FRA, the evidence established in discovery clearly shows that respondent was negligent in raising the speed limit from 10 mph to 25 mph at the McGalliard Crossing. The evidence established that it was not uncommon for motor vehicles to become trapped on

McGalliard Crossing as trains approached because of traffic conditions. The evidence presented to the district court showed that in raising the speed limit from 10 mph to 25 mph, the ability for a train to stop at this recognized problematic crossing was severely diminished.

A material issue of fact existed as to whether or not respondent was negligent in raising the speed limit and in not installing crossing gate protection once the decision was made to increase the speed limit. The FELA requires that a railroad use ordinary care to provide its employees with a reasonably safe place to work. In this case, the Court of Appeals decided that respondent fulfilled its obligation under the FELA to provide a reasonably safe place to work by complying with regulations which had absolutely no correlation to reasonably safe conduct at the time and place alleged. Not only is the decision below contrary to the intent of the FELA, the ironic result of the Seventh Circuit's decision is that it will decrease a railroad's incentive to operate a train at a safe speed or provide adequate warning and signal protection at a particular crossing.

In ruling that cases brought under federal law should be treated the same as state common law causes of action, the Court of Appeals has disregarded the previous decisions of this Court which have held that FELA plaintiffs are treated differently under the law than common law plaintiffs. In *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957), *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), and *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court held that the quantum of evidence required to establish liability in a FELA case is much less than in an ordinary common law negligence action. As this Court stated in *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326 (1958):

> [I]n interpreting the FELA, we need not depend upon common

> law principles of liability. This statute, an avowed departure from the rules of common law, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading must be borne by someone and the FELA seeks to adjust that expense equitably between the worker and the carrier.

Sinkler, 356 U.S. at 329-30 (Citations omitted). Moreover in *Crane v. Cedar Rapids and Iowa City Ry.*, 395 U.S. 164, 166 (1969) this Court distinguished between the defenses available to a railroad defendant in a common law action as opposed to an FELA action involving the Safety Appliance Act. Unlike a common law case, this Court held that the defenses of contributory negligence and assumption risk were not available to a defendant in an FELA case involving the Safety Appliance Act. *Crane*, 395 U.S. at 166. In sum, this Court has always recognized the unique status of a FELA plaintiff because the FELA is the primary means of compensation for a railroad employee who suffers an on the job injury. In addition, this Court has recognized that trial by jury is part of the remedy in FELA cases. *Altantic v. Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

The Court of Appeals in the decision below ignored the scope and purpose of the FELA enunciated by this Court in prior decisions. In ruling that for purposes of train speed and crossing protection, the FRSA supersedes the FELA, the Court of Appeals has in effect taken on the legislative role of

amending the FELA. This decision is a severe blow to the federal statutory rights of railroad employees who face the risk of injury in operating trains over railroad crossings throughout America. The United Transportation Union respectfully submits that the decision below cries out for further review by this Court and ultimate reversal.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae, United Transportation Union would respectfully requests that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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